In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1396

DONALD W. AND ANITA C. FAUSNER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner[1] is a commercial airline pilot who, during the years in question, regularly utilized his private automobile to transport himself from his home to his principal place of employment and back again, a round-trip distance of approximately 84 miles. Each time petitioner made this trip he carried a flight kit bag weighing 40 pounds and an overnight bag weighing 20 pounds. On his federal income tax returns for 1966 and 1967 petitioner, relying principally on the fact that the circumstances of his job required him to carry the flight bag and overnight bags to and from work, deducted as ordinary and necessary business expenses under Section 162(a) of the Internal

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[1] References to "petitioner" are to Donald W. Fausner. Anita C. Fausner is a party here only because joint income tax returns were filed for the years in issue.

Revenue Code of 1954 the entire cost of driving his automobile to work. The Tax Court denied the entire deduction; it reasoned that commuting costs are personal and nondeductible (see *Commissioner* v. *Flowers,* 326 U.S. 465), that, as the court found, petitioner would have used his automobile to commute to work even if he were not required to carry the bags, and that the carrying of the bags should not convert the personal commuting expense to a deductible business expense. (Pet. App. A, pp. 11-25.) The court of appeals affirmed. (Pet. App. B, pp. 27-30.)

The courts below correctly concluded, in our view, that since petitioner produced no evidence to show that he incurred any expense as a result of carrying the bags in excess of what he would have incurred had he not been required to carry the bags, he was not entitled to a deduction. Noting that its opinion did not preclude the deduction of "expense in excess of ordinary commuting expenses which can be shown to have been incurred in transporting job-required tools and materials to or from the work site," the court of appeals reasoned that (Pet. App. A, p. 30):

> One primary aim of the income tax statute is to ensure that taxpayers similarly situated bear similar burdens. Since the record shows that Fausner would have driven his car to and from his place of employment anyway, we cannot find that he is entitled to what would amount to special relief which would distinguish him from other taxpayers because of the mere fortuity that he placed the bags he was required to carry in the trunk of his commuting vehicle.

Though we believe that the result reached by the courts below is correct, we agree with petitioner that the decision is in direct conflict with the decisions of the Second and Seventh Circuits. *Sullivan* v. *Commissioner,* 368 F. 2d 1007 (C.A. 2), after remand, 69-2 U.S.T.C., par. 9448

(C.A. 2), certiorari denied, 396 U.S. 827,[2] and *Tyne* v. *Commissioner*, 385 F. 2d 40 (C.A. 7), after remand, 409 F. 2d 485 (C.A. 7), certiorari denied, 396 U.S. 833, on remand, 29 T.C.M. 1398, affirmed, 468 F. 2d 913 (C.A. 7). In these cases, as here, taxpayers claimed deductions for commuting expenses they would have incurred in any event, on the ground that they were required to carry tools to work which necessitated the use of the mode of transportation whose cost they sought to deduct. The courts of appeals in both of these cases held that deduction of some allocable portion of the expenses incurred should be allowed as an ordinary and necessary business expense.[3]

We also agree with petitioner that resolution of the issue in this case is of significant importance to the administration of the federal tax laws. The factual situation in which a taxpayer commutes to work carrying heavy tools with him is doubtless a very common one. There are now pending 140 cases in docketed status and 23 cases in non-docketed status in which taxpayers seek deductions for the transportation of tools and equipment in their private auto-

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[2] The Second Circuit has recently affirmed its position on this issue. *Coker* v. *Commissioner*, Nos. 72-2309 and 73-1011, decided May 14, 1973.

[3] Indeed, as petitioner points out (Pet. 8-9) the Tax Court in prior litigation involving his taxable year 1965 held, on substantially identical facts as are presented by the instant litigation, that he was entitled to a partial deduction for that portion of his driving expenses theoretically allocable to the transportation of his bags. See *Fausner* v. *Commissioner*, 55 T.C. 620. As the court below noted (Pet. App. B, p. 28), the reason for the apparently contradictory results in the Tax Court is that petitioner changed his residence from a state within the jurisdiction of the Second Circuit (which had decided the *Sullivan* case, *supra*) to a state within the jurisdiction of the Fifth Circuit, which had not previously considered the issue. See *Golsen* v. *Commissioner*, 54 T.C. 742, affirmed, 445 F. 2d 985 (C.A. 10).

mobiles to and from work.[4] Furthermore, the approach adopted by the Second and Seventh Circuits, in which the commuting expenses are required to be allocated in part to the carrying of tools, would, if upheld, create a substantial burden on the Internal Revenue Service and the courts which decide questions of federal tax law.

Accordingly, we concur in petitioner's suggestion that uniform administration of the tax law requires that the question presented in this case be clarified, and do not oppose the petition for certiorari.

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Solicitor General.

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MAY, 1973.

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[4] The question presented by this case is now pending in the Ninth Circuit. *Castillo* v. *Commissioner,* 30 T.C.M. 354, on appeal to C.A. 9, No. 71-1922.